Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

RUTH ANN EDWARDS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the petitioner — the plaintiff in a medical malpractice action — file a notice of administrative claim as required by the Federal Tort Claims Act, 28 U.S.C.A. § 2401(b), within two years after she became aware of both the existence of an injury and its cause?

2. Can a patient's claim for medical malpractice accrue *before* her doctors are aware of the nature of her injury and its cause?

3. Is the *Kubrick* standard for determining the date of accrual of a medical malpractice claim adequate where the patient's doctors are not aware of the nature of the injury or its cause?

4. Did the Fourth Circuit improperly apply the *Kubrick* standard in conflict with the decisions of other courts of appeal since the petitioner's duty of diligent inquiry did not arise until her treating doctors became aware of the nature of her injury and its cause?

5. Was the petitioner deprived of a meritorious malpractice action because the lower courts erroneously dismissed her complaint for the failure to file a timely administrative claim?

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Petitioner, Ruth Ann Edwards, respectfully requests that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Fourth Circuit which affirmed an order for summary judgment granted to the defendant by the United States District Court for the Eastern District of Virginia, Norfolk Division.

OPINIONS BELOW

On May 21, 1998, the United States District Court for the Eastern District of Virginia, Norfolk Division, granted the motion of the United States of American for summary judgment (13a). On July 6, 1998, the District Court denied the motion of Ruth Ann Edwards for reconsideration (7a). On February 22, 1999, the United States Court of Appeals for the Fourth Circuit affirmed the orders of the District Court (1a). All of the opinions are unpublished.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(l). This petition has been timely filed within 90 days after entry of the judgment of the Circuit Court on February 22, 1999.

STATUTE INVOLVED IN THE CASE

> A tort claim against the United States shall be forever barred *unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues* or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

(Emphasis added). 28 U.S.C. § 2401(b).

STATEMENT OF THE CASE

Ruth Ann Edwards was injured on February 6, 1990 when she was caused to slip on grease during the course of her employment with McDonalds at the United States Naval Base on Guantanamo Bay (GTMO), Cuba. She fell on her hands and fractured both wrists including a comminuted fracture of the left radial styloid and an undisplaced, intra-articular fracture of the right distal radius. She was treated at the orthopedic clinic at GTMO with a short arm cast of the left wrist from February 6-March 14, 1990 and a short arm cast of the right wrist from February 12-March 14, 1990.

Miss Edwards returned to the clinic on March 20 with complaints of pain, swelling and redness in her left wrist. On April 12, she had swelling in her right wrist. She was admitted to Portsmouth Naval Hospital (PNH) on May 14, 1990 for excision of a recurrent right volar ganglion and was placed in a volar splint. She underwent a hand consult at PNH on July 9, 1990 due to right wrist pain with a diagnosis of scaphoid-lunate dynamic dissociation. An arthrogram at PNH on July 12, 1990 revealed dye leaking from the radio-carpal joint to the mid-carpal joint.

On August 30, 1990, Dr. Schacherer and Dr. Gerbino performed a scaphoid-lunate fibrous arthrodesis (SLERPIE) at PNH. They used two threaded K-wires to secure the scaphoid to the lunate and a third smooth K-wire through the radial styloid into the proximal pole of the scaphoid. The pins were cut off above the skin and bent at a 90 degree angle. The wound was dressed with Xeroform gauze and plain gauze followed by bulky hand dressing and thumb spica splints.

On September 5, splint was replaced with a long arm thumb spica (LATS). On September 12, the sutures were removed and the petitioner's right hand was placed in a short arm thumb spica (SATS). She went to St. Peters Medical Center in New Brunswick, N.J. on September 16, 1990 with complaints of a tight cast and swelling of the fingers. The cast was split by Dr. Leddy.

On October 12, 1990, Miss Edwards was examined in the Ortho Clinic at PNH. The radial styloid pin had rotated into the skin. The pin was rotated out and padded. She was returned to SATS and advised to remove the pins in 6 weeks. On October 29, she returned to the clinic with complaints of pain. Upon physical examination, Dr. Gerbino noted that the proximal pin was loose with redness and exudate. The smooth pin was removed and Miss Edwards was admitted to PNH with a diagnosis of "R wrist pin tract infection." On November 2, she returned to St. Peters Medical Center where Dr. Leddy removed the two threaded pins.

Ruth Ann returned to GTMO for a physical therapy evaluation on December 17, 1990. She had complaints of pain in her right wrist, shoulder and elbow with "minimal wrist effusion" and loss of motion. She returned to the orthopedic clinic on January 4 and 9, 1991 due to chronic wrist pain.

At the request of McDonald's workers' compensation carrier, the petitioner was examined by Dr. Scott Jaeger of Haddonfield, New Jersey on January 31, 1991 with complaints of pain and snapping over the ulnar aspect of the right wrist, painful neuroma over the radial aspect of the right wrist and pain over the radial aspect of the left wrist. Dr. Jaeger noted a diagnosis of status post bilateral

distal radial fractures complicated by deQuervain's syndrome, unstable exterior carpi ulnaris and right radial nerve neuritis. An MRI on February 24 revealed post surgical changes of the volar aspect of the right wrist with a suggestion of scar formation in subcutaneous tissue deep to flexor tendons. Dr. Jaeger performed surgery at Jefferson Park Hospital on May 8, 1991 and stated in the operative report that "there was significant *scarring of the nerve to a portion of the abductor tendon of the thumb* as well as a tight fibrotic reaction." On June 25, Dr. Jaeger wrote to the compensation carrier and commented that "there is a very severe amount of fraying of her tendon that is leading to the continued inflammation."

In his report of August 25, 1997, Dr. Jaeger states that the SLERPIE procedure was "experimental" with a success rate of "only 82%." The placement of the radio-carpel pin — the smooth wire through the radial styloid — "significantly increased the risk to the patient." Accordingly, the physician should have taken care "to avoid the first dorsal retinacular compartment" (where the abductor tendon of the thumb is located) and "to closely monitor the immobilization since any loosening can result in . . . a fraying of the extensor tendon due to motion of the thumb." Dr. Jaeger expressed the opinion that "the radio-carpal pin was inserted in such a manner as to impale the extensor tendons in the first dorsal retinacular compartment." As a result, "the tendon became frayed after October 12, 1990 due to physical forces that caused the tendon to move against the pin."

Dr. Jaeger concluded that the failure to remove the radial styloid pin on October 12, 1990 was a deviation from standard medical practice and "there would have been no

infection nor any fraying of the tendon" if the pin had been removed. Accordingly, "*the failure to remove the pin on October 12, 1990 was the cause of the fraying of the tendon.*"

On January 14, 1993, Ruth Ann Edwards mailed a Notice of Claim by certified mail, return receipt requested, to the Department of Navy pursuant to 28 U.S.C. § 2401(b). The postal receipt was dated January 19, 1993 and the Notice was stamped "received" on January 20, 1993 — within 2 years from the date of Dr. Jaeger's first examination. Subsequently, the petitioner filed a medical malpractice action against the United States of America. In response, the respondent filed a motion for summary judgment contending that the petitioner's notice of claim was not filed within two years from the date that her claim accrued. The respondent cited the Fourth Circuit case of *Kerstetter v. United States of America*, 57 F.3d 362, 364-365 (4th Cir. 1995) for the proposition that a patient does not need to know "the precise medical reason for the injury" as long as she knows "the critical fact" of "who has inflicted the injury."

The District Court concluded that Edwards was aware, or should have been aware, of her injury and of its cause by November 1990. The court stated that:

> In November 1990, Edwards was aware that she had been through an August surgery at Portsmouth Naval Hospital during which pins were inserted to repair her right wrist. She was also aware that she had returned to Portsmouth Naval Hospital on two occasions and to a civilian hospital on at least one occasion complaining

> about complications related to her surgery. Finally, during the second return visit to the Naval Hospital, employees ripped out one of the pins while trying to take Edwards' cast off to treat an infection. After this mishap, Edwards knew that she was not getting adequate treatment and checked herself out of the Naval Hospital. She then sought treatment at a civilian hospital where the pins were removed in early November 1990. Yet, after all the pins were removed, Edwards could not move her wrist.

Under the circumstances, the District Court held that Edwards was aware of the deficient treatment at PNH before November 1990 — even though she did not know the precise medical reason for her injury (a pierced tendon). Accordingly, the court held that her claim accrued in November 1990 and that she did not file her administrative claim within the two-year statute of limitations. The District Court granted the respondent's motion for summary judgment and the Court of Appeals affirmed.[1]

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1. The opinion of the District Court is based upon a misinterpretation of the facts and the legal contentions of the petitioner. First, the petitioner's claim in this case is based upon the insertion of a pin through a tendon during surgery on August 29, 1990 and the failure to remove the pin on October 12, 1990. She did go to St. Peter's Medical Center on September 16, 1990 where the cast was split and she did go to the orthopedic clinic at PNH on October 29, 1990 where the pin was removed; however, she does not contend that the doctors at PNH were negligent in the application of the cast (which caused pain in the wrist because of its tightness) or in the removal of the pin (which was painful because done without anesthesia). The District Court has misinterpreted the facts by concluding that "one of the pins was *inadvertently* ripped out of her wrist by an employee of Portsmouth

(Cont'd)

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Naval Hospital while her cast was being *prematurely* removed due to an infection caused by a loose pin." In fact, the cast was removed on *each* office visit so that the doctor could examine the wound and the pin was removed *intentionally* — not inadvertently — on October 29 because of the infection. There is no medical evidence that the method in which the pin was removed was improper or contributed to the infection or the fraying of the tendon. The petitioner's claim is that the pin should have been removed on October 12, not that the pin was improperly removed on October 29.

Secondly, there is no allegation that the pin was torn out "improperly." Dr. Jaeger asserts that the pin should have been removed on October 12; he does not criticize the manner in which the pin was removed. There is no allegation that the removal of the pin "caused infection." In fact, there was redness around the proximal pin with exudate for several days *before* the pin was removed. There is no allegation that the hardware was a "screw" that should not have been "yanked" out. In fact, the hardware that was removed was a pin (a smooth K-wire), not a screw (a threaded K-wire).

REASONS FOR GRANTING THE WRIT

I. Medical malpractice actions against military hospitals are matters of special importance.

II. The Federal Tort Claims Act does not define "accrual of a claim."

III. The *Kubrick* standard for determining the date of accrual of a medical malpractice claim is inadequate where the patient's doctors are not aware of the nature of the injury or its cause.

IV. The *Kubrick* standard has special importance because it applies to all cases involving the discovery rule.

V. The Fourth Circuit improperly applied the *Kubrick* standard in conflict with the decisions of other courts of appeal because the petitioner's duty of diligent inquiry did not arise until her treating doctors became aware of the nature of her injury and its cause.

VI. The petitioner was deprived of a meritorious medical malpractice action because the lower courts erroneously dismissed her complaint for the failure to file a timely administrative claim.

ARGUMENT

The Federal Tort Claims Act provides that "a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b). While the statute does not define "accrual", the courts have held that a medical malpractice action accrues when "the plaintiff has discovered both his injury and its cause." In other words, the statute of limitations does not begin to run until the plaintiff is "in possession of the critical facts that he has been hurt and who has inflicted the injury." *United States v. Kubrick*, 444 U.S. 111, 120-123 (1979).

In *Kubrick*, the plaintiff suffered a hearing loss 6 weeks after being treated for a leg infection at a Veterans' Administration hospital. In January of 1989, he was advised that his condition was caused by the administration of the antibiotic neomycin while he was at the hospital. Kubrick contended that he did not discover that the medication was negligently administered until June 1971. Accordingly, he filed suit in late 1972, less than two years after discovering that the doctors may have been guilty of malpractice.

The Supreme Court recognized that medical malpractice claims do not begin to run "until the plaintiff has discovered both his injury and its cause." Nonetheless, the accrual does not await "awareness by the plaintiff that his injury was negligently inflicted." The Court noted that Kubrick was in possession of "the critical facts that he has been hurt and who has inflicted the injury." Based upon that knowledge, he "need only have made inquiry among doctors with average training and experience in such matters to have discovered that he probably had a good cause of action."

Instead, he consulted with several specialists about his loss of hearing, but he never made any inquiry about his treatment until more than two years later. Under the circumstances, Kubrick's claim accrued in January 1989 and his suit was barred by the two-year statute of limitations.

Accordingly, *Kubrick* has established a standard of "diligent inquiry." Once the plaintiff becomes aware of his injury and its cause, he is "no longer at the mercy" of the "putative defendant." At that time, "there are others who can tell him if he has been wronged, and he need only ask." A plaintiff "armed with the facts . . . can protect himself by seeking advice in the medical and legal community."

What happens, however, if the patient seeks further medical treatment, but his treating doctors are *not aware* of his injury or its cause? In *Kubrick*, the plaintiff was aware of his injury (hearing loss) and its cause (neomycin). He sought medical treatment but never asked if he had "a good cause of action." What would have happened if Kubrick was treated for "a ringing sensation in his ears and some loss of hearing," but his doctors were not aware of his bilateral nerve deafness or that it was caused by the administration of neomycin? How could his doctors advise him that "he probably had a good cause of action" when they themselves were not aware of his injury or its cause? Under those circumstances, the knowledge of the doctors that the negligent administration of neomycin can cause nerve deafness cannot be imputed to the plaintiff since neither the doctors nor the plaintiff were aware of the nature of the injury or its cause.

The facts of this case are different than *Kubrick* and place Ruth Ann Edwards in the same dilemma that William

Kubrick would have faced if he knew that he had some loss of hearing, but did not know that he had nerve deafness or that this was caused by neomycin. The *Kubrick* standard is inadequate where the treating doctors are not aware of the injury or its cause. Under those circumstances, the patient's duty of diligent inquiry does not arise until the doctors are aware of the existence of the injury and its probable cause.

In this case, the petitioner, Ruth Ann Edwards, sustained *two separate and distinct* injuries:

1. A fracture of her right wrist with a subluxation of the scapholunate joint as a result of her fall on February 6, 1990 and

2. A scarring and fibrosis (fraying) of the abductor tendon of the right thumb that resulted from the improper insertion of the radial styloid pin through the tendon during surgery on August 29, 1990 and the failure to remove the pin on October 12, 1990.

Her knowledge of her injuries and the cause of her complaints was different for each of the two separate and distinct medical conditions.

Ruth Ann knew that she fractured her right wrist when she fell on February 6, 1990. On July 12, she knew that the scaphoid and lunate bones in her wrist had separated and that she required surgery. On August 20, she knew that the doctors had inserted three pins into her wrist and that she would be in a cast for 12 weeks. On October 12, she knew that one of the pins had rotated. On October 29, she knew that the pin had been removed and that she was admitted to the hospital for treatment of an infection. While at the

hospital, Ruth Ann was "upset and crying" because, after they took out the pin, her cast was a mess. "They left the cast where it was half on and the fiberglass was all eaten (sic) my skin and everything." "It was irritating me, and they weren't coming to me to do anything." Accordingly, she and her mother decided to leave the hospital because "we're not getting — you're not getting the treatment."

On November 2, 1990, Ruth Ann knew that Dr. Leddy had removed the remaining two pins. She was aware that her wrist was stiff. She stated that the wrist "just hung all the way down" until she started therapy "when it started getting where to the point I could start moving it over time." The physical therapy evaluation at GTMO on December 17, 1990 indicates complaints of pain and loss of motion of the right wrist; *minimal* wrist effusion; *mildly* affected without atrophy. Theses complaints are similar to the complaints of pain, swelling and loss of motion that she had at the orthopedic clinic at GTMO *before* the surgery.

What Ruth Ann did not know was that she had sustained a frayed tendon. She did not know that the injury was caused by the insertion of a pin through the tendon during surgery on August 29, 1990 and the movement of the tendon after the pin became loose on October 12. *Neither did her doctors.* The doctors at PNH did not know that she had sustained a tendon injury when they discharged her on November 1. (She was treated only for an infection). Dr. Leddy did not know that she had a tendon injury when he treated her at St. Peter's Medical Center on November 2, 1990. (He only removed the remaining two screws). The doctors at the GTMO clinic did not know that she had a tendon injury when they treated her from December 15, 1990 to January 9, 1991 for chronic wrist pain. In fact, none of the doctors

ever told Ruth Ann that she had sustained an injury to the tendon of her right thumb. If the doctors didn't know, how could she?

When was the tendon injury discovered? Dr. Jaeger was asked to evaluate Ruth Ann on January 31, 1991 by her workers' compensation carrier because of her *wrist* pain. Her major complaint was "pain and snapping over the ulnar aspect of her right wrist, painful neuroma type symptoms over the radial aspect of the right wrist." Upon physical examination, Dr. Jaeger observed "pain over the extensor carpi ulnaris" and he rendered a diagnosis of "status post bilateral distal radial fractures complicated by deQuervain's syndrome bilaterally as well as an unstable extensor carpi ulnaris."

Dr. Jaeger was the first physician to have recognized that Ruth Ann was having a problem with her *thumb*, not her wrist. This examination was the first time that anyone recognized that Ruth Ann's pain was related to a tendon injury (caused by the surgery) and not from the wrist fracture (caused by the fall). Ruth Ann stated in her deposition that Dr. Jaeger told her that:

> The military had really messed up on the surgery that they did, and that they totally destroyed my right tendon and because of that, I had to have a tendon transplant.

In fact, even Dr. Jaeger could not confirm the diagnosis until he performed his first surgical procedure on May 8, 1991. At that time, he was able to observe a "significant scarring of the (radial) nerve to a portion of the abductor tendon as well as a tight fibrotic reaction." Accordingly, he

wrote to the compensation carrier on June 25, 1991 to indicate that he observed "a very severe amount of fraying of her tendon . . ."

It is clear that none of the prior physicians — no one at GTMO, PNH or St. Peters — were aware that Ruth Ann had sustained an injury to her tendon during the course of the surgery and post-operative care. While Dr. Jaeger suspected a tendon injury when he examined her on January 31, 1991, he could not confirm the injury until he performed surgery on May 8, 1991. If the doctors did not know, Ruth Ann Edwards could not have known that she had sustained an injury to her tendon or that the injury was caused by the surgery until she was so advised by Dr. Jaeger.

Under *Kubrick*, Edwards had a duty to make a diligent inquiry when she discovered both her injury and its cause. When did that duty arise? The lower courts suggest that she knew in November of 1990 that she had an injury and that it was caused by the treatment she received at PNH. What was she to do? Who was she supposed to ask if she had a good cause of action? Her treating doctors did not know that she had a frayed tendon. They did not know that the injury was caused by the surgery and the post-operative care. How could she have protected herself from the putative defendant when her doctors were unable to give her "competent advice" as to whether her treatment "conformed" to the applicable standard of care?

Ruth Ann Edwards did seek medical advice contemporaneously with the events. She remained under the care of the doctors at PNH, GTMO and St. Peters from August 1990 until January 1991; however, no one told her that she had a tendon injury or that she "probably had a

good cause of action." In fact, none of the doctors could have given her such advice because *they* did not know that she had sustained a tendon injury or its cause.

Ruth Ann was not "armed with the facts" that a harm was done to her until she saw Dr. Jaeger on January 31, 1991. That was the first time that she became aware of "the critical facts that (she) has been hurt and who inflicted the injury." That was the first time that she could have discovered that she "probably had a good cause of action." After she learned of her injury, Ruth Ann did not wait more than two years — as did Kubrick — to make "any inquiry about (her) treatment." She did not sleep on her rights. She filed a Notice of Claim within two years of the date that she first saw Dr. Jaeger — the first time that she became aware of her injury and its cause.

It is clear that the petitioner's duty to make diligent inquiry arose no sooner than January 31, 1991 when Dr. Jaeger suggested that she had an injury to her thumb and no later than May 8, 1991 when he observed a frayed tendon during the course of surgery. At that time, Ruth Ann had the duty to inquire whether the treatment rendered at PNH conformed to the appropriate standard of care. At that time, Ruth Ann became aware of the "critical facts" and had the obligation to ask. At that time — and not before — she "need only had made inquiry among doctors with average training and experience in such matters to have discovered that (she) probably had a good cause of action."

In *Kubrick*, the plaintiff never made such inquiry. In this case, Ruth Ann Edwards did. Based upon the response of Dr. Jaeger, Ruth Ann determined that she probably had a good cause of action. Accordingly, she properly filed an

administrative claim with the Department of the Navy within two years from the date that her claim accrued.

The case of *Kerstetter v. United States of America*, 57 F.3d 362, 364-366 (4th Cir. 1995), cited as authority by Judge Clark, is not in point. The plaintiffs filed a medical malpractice action against the doctors at Portsmouth Naval Hospital as a result of surgery performed upon their daughter to remove a malignant abdominal mass. The surgery was performed on June 4, 1987 and Elizabeth was unable to urinate after the operation. The attending surgeon informed the parents that their daughter's kidneys had shut down during surgery due to shock but would probably clear up shortly. In late June or early July, the Kerstetter's were informed that Elizabeth's kidney "would never resume functioning." She received a kidney transplant in October 1987.

The plaintiffs contended that they did not become aware of the cause of the kidney failure until they were told by another doctor in September 1990 that the condition resulted from damage to the blood vessels during the 1987 surgery. Accordingly, they filed an administrative claim in August of 1992 — within two years from the date that they discovered the cause of the injury.

The Circuit Court suggested that the relevant issue was not merely a factual dispute but was a question of law: "what does 'cause' mean for the purposes of FTCA." The plaintiffs argued that they must have knowledge of "the precise medical reason for the injury." The defendant argued that the plaintiff must have "only knowledge that the operation caused the injury." The court stated that:

> It should not make a difference when the plaintiff learns just what went wrong during a medical

> operation. So long as the plaintiff knows "the critical fact" of "who has inflicted the injury," he can act to protect his rights by inquiring whether the injury was inflicted negligently.

The court found that the Kerstetters were aware that Elizabeth had been injured and that the surgery caused her injury no later than July 1987. Accordingly, their notice of claim was filed more than two years after the claim accrued.

The facts in this case are quite different. Ruth Ann Edwards did not know that she sustained an *injury to the tendon* in her right thumb until she saw Dr. Jaeger on January 31, 1991. She did not know that her injury was *caused by the surgery* until after Dr. Jaeger's operation on May 8, 1991. Accordingly, she did not know that the operation caused the injury until she was advised by Dr. Jaeger. Her notice of claim — unlike the Kerstetters — was filed within two years after the claim accrued.

The opinion of the Fourth Circuit in *Kerstetter* and in this case that a patient is not required to know "the precise medical reason" for her injury conflicts with the decisions of other courts of appeal in cases where the treating doctors are not aware of the cause of the injury. For example, the Eighth Circuit has held that the duty of diligent inquiry does not arise until the patient is told "unequivocally" that the injury may have been caused by the treatment. In *Osborn v. United States of America*, 918 F.2d 724 (8th Cir. 1990), the plaintiffs brought a medical malpractice action against a United States Air Force clinic based upon the negligent administration of a DPT vaccination to their child that caused her to develop seizures and neurological injury. The vaccination was administered on December 16, 1981. On

May 6, 1983, the mother had a conversation with Dr. Bruce Oksol who diagnosed a seizure disorder and noted that Shawna should not get any more DPT vaccine. Thereafter, the child was evaluated by several other doctors who did not know the cause of the seizures. Finally, Shawna was examined by Dr. Dennis Bartholomew on March 8, 1984. He advised the parents that the seizures may have been precipitated by the DPT shot and that the clinic should not have given the vaccine because Shawna had a prior history of seizures.

The Eighth Circuit Court of Appeals recognized the *Kubrick* standard that a claim under the Federal Tort Claims Act does not accrue until the plaintiff is aware both of the injury and its cause; however, the court noted that "a plaintiff is entitled to rely on the advice of his doctors." The court explained that a patient "can only be charged with the knowledge that he could have acquired by making inquiry among doctors with average training." Mrs. Osborn persistently tried to discover the cause of the seizures but "doctors could provide no explanation" and her efforts were "unavailing." Accordingly, the court concluded that she was not advised "unequivocally" of the cause until she spoke to Dr. Bartholomew on March 8, 1984. Before that date, she could not have known the cause of the seizures when the doctors had not yet reached a conclusion. Likewise, in this case, Ruth Ann Edwards was not told "unequivocally" that her injury was caused by the surgery until she consulted with Dr. Jaeger.

In the First Circuit, the court has held that the duty of diligent inquiry does not arise until the patient's treating doctor makes the correct diagnosis. In *Nicolazzo v. United States of America*, 786 F.2d 454 (1st Cir. 1986), the plaintiff

sued the Veterans' Administration for negligent diagnosis and treatment. *Nicolazzo* was injured in a helicopter crash in 1969 and experienced severe head and ear pains for many years. In 1977, his condition was diagnosed as an infection of the external ear canal; however, he did not respond to treatment. In October 1980, he was examined by Dr. Bruce Trembly who hypothesized for the first time that Nicolazzo sustained a skull fracture in the accident and developed a chronic infection at the site of the trauma.

The District Court concluded that the plaintiff became aware of the existence and cause of his injury as soon as he became aware that the treatment was not aiding him and he "voiced complaints" about the V.A. hospital. Nonetheless, the Circuit Court reversed because "the factual predicate for his medical malpractice claim could not have become apparent to him before receiving a correct diagnosis in 1980." The court concluded that Nicolazzo's duty to make diligent inquiry did not arise until he became aware of the correct diagnosis. At that time, he had the responsibility to make "inquiries among the medical and legal profession in order to ascertain whether the acts or omissions of his doctors had constituted negligence." In *Nicolazzo*, the plaintiff "made such inquiries and filed his FTCA claims within two years of receiving the correct diagnosis." Likewise, in the instant case, Ruth Ann Edwards received the correct diagnosis *for the first time* when she was examined by Dr. Jaeger on January 31, 1991, not when she "voiced complaints" about the treatment she was receiving at PNH in November 1990. Accordingly, her notice of claim was properly filed within two years from the date that her claim accrued. *See Galarza v. Zagury*, 739 F.2d 20 (1st Cir. 1984), where the First Circuit held that the plaintiff's "mere knowledge" that her incontinence stemmed from surgery

performed by the doctor is not enough to trigger the statute of limitations until she became aware that her sphincter had been lacerated and that her incontinence was due to the laceration.

The Eleventh Circuit had held that a patient "cannot be expected to discover the general medical cause of his injury even before the doctors themselves are able to do so." In *Chamness v. United States of America*, 835 F.2d 1350 (11th Cir. 1988), the infant plaintiff brought a medical malpractice action against the Air Force for injuries sustained during the course of delivery in November of 1980. Her parents were advised that she was developmentally impaired in July 1981; however, all of her doctors concluded that her mental retardation was a "statistical aberration." In December of 1983, Mrs. Chamness learned from a television program that certain drugs administered during labor were contraindicated and that Kendra's condition was "probably attributable" to those drugs.

The court concluded that a patient "cannot be expected to discover the general medical cause of his injury even before the doctors themselves are able to do so." Accordingly, the plaintiff was not aware of both the injury and its cause until she saw the television program. Likewise, in this case, Ruth Ann Edwards cannot be expected to discover the cause of her injury until her doctors were able to do so — when Dr. Jaeger examined her on January 31, 1991.

The Seventh Circuit has held that a patient must have more than a "suspicion" of negligence, but must be fully informed as to the cause-and-effect relationship between

her injury and the treatment. In *Stoleson v. United States of America*, 629 F.2d 1265, 1267-1270 (7th Cir. 1980), the plaintiff suffered a heart attack in 1968 and "suspected a connection between her heart problems and her working conditions"; however, it was not until April 30, 1971 that she was examined by Dr. R.L. Lange who concluded that her cardiovascular problems were related to her exposure to nitroglycerine at work.

The Government contended that the plaintiff's suspicion that her occupational exposure "was the culprit is sufficient knowledge of causation to trigger the statute of limitations." Nonetheless, in 1968, the medical profession had not recognized the causal relationship between angina and chronic exposure to nitroglycerine. Accordingly, "had Mrs. Stoleson sought competent legal advice, she would have been informed quite correctly that she had no claim against the Government."

Accordingly, the court held that Mrs. Stoleson's "suspicion" did not "ripen into knowledge" until Dr. Lange supplied "the critical fact" as to causation. On that date, she became "armed with knowledge of (her) injury and its cause" and she would be "no longer at the mercy of a defendant's specialized knowledge." On that date, her duty to make diligent inquiry — to ask other professionals — arose and, on that date, the statute of limitations began to run. Likewise, in this case, while Ruth Ann Edwards might have discharged herself from PNH and might have felt "suspicion" as to the quality of care that she was receiving, she was not aware of the critical fact of causation until she consulted with Dr. Jaeger. *See Drazan v. United States of America*, 762 F.2d 56 (7th Cir. 1985), where plaintiff was aware of her husband's death due to lung cancer; however,

the statute of limitations did not start to run "until she discovered the government link in the causal chain."

In summary, the opinion of the Fourth Circuit that a patient is not required to know "the precise medical reason" for her injury conflicts with the decisions of other courts of appeal in cases where the treating doctors are not aware of the cause of injury. In this case, Ruth Ann Edwards was not "unequivocally" aware of the cause of her injury (*Osborn*) until she was examined by Dr. Jaeger; she did not receive "the correct diagnosis" (*Nicolazzo*) until she was examined by Dr. Jaeger; her "suspicions" did not "ripen into knowledge" (*Stoleson*) until she was examined by Dr. Jaeger; and her treating doctors were unable to determine the cause of her injury (*Chamness*) until she was examined by Dr. Jaeger.

Before January 31, 1991, neither Ruth Ann Edwards nor her doctors were aware of the nature of her injury or its cause. If she had made a specific inquiry of her treating doctors, she would have been told that she had *no cause of action* against the government since no one knew a pin was inserted through a tendon during surgery or that the tendon had become frayed. *See Stoleson v. United States of America*, 629 F.2d 1265, 1267-1270 (7th Cir. 1980).

On January 31, 1991, Ruth Ann was examined by Dr. Jaeger. For the first time, she was advised as to the nature of her injury (a frayed tendon) and its cause (the insertion of a pin during surgery). On that date, her duty arose to make diligent inquiry. On that date, her cause of action accrued. Ruth Ann Edwards filed a notice of administrative claim on January 20, 1993. This notice was filed within two years from the accrual of her claim and complied with the provisions of the Federal Tort Claims Act. Accordingly, her complaint should not have been dismissed.

CONCLUSION

This Petition for a Writ of Certiorari arises from the respondent's motion for summary judgment. Accordingly, the Court must review the evidence most favorable to the petitioner and determine whether the United States of America is entitled to judgment as a matter of law. The petitioner contends that there are genuine issues of fact that compel a plenary trial and that the lower courts failed to properly apply *Kubrick*. Accordingly, the decision of the lower courts should be reversed as a matter of law.

This case involves a subject of special importance — medical malpractice actions against military hospitals. It involves an important statute, the Federal Tort Claims Act, that includes a statute of limitations, but does not define "accrual." It involves an important Supreme Court opinion, *Kubrick v. United States of America*, that deals with all medical malpractice actions and other cases involving the discovery rule. *See Stoleson v. United States of America*, 629 F.2d 1265, 1267-1270 (7th Cir. 1980) (occupational exposure). It involves an issue that was not decided by *Kubrick* — whether a cause of action can accrue *before* a patient's treating doctor is aware of the nature and cause of an injury. And it involves a Circuit Court opinion that conflicts with the decisions of other courts of appeal.

Accordingly, the petitioner respectfully requests that the Supreme Court grant her petition for a Writ of Certiorari.

Respectfully submitted,

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